Supreme Court, U.S.
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No. 04-7

IN THE

Supreme Court of the United States

ANTHONY J. MILITELLO,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner, Anthony J. Militello, waived his argument that Respondent, Central States, Southeast and Southwest Areas Pension Fund, violated the "anti-cutback" rule of the Employee Retirement Income Security Act of 1974 ("ERISA"), because he failed to raise it in the lower courts.

2. Whether the Seventh Circuit correctly held that 29 U.S.C. § 1053(a) and 29 C.F.R. § 2530.203-3 do not apply to claimants who have not attained normal retirement age.

3. Whether the Seventh Circuit correctly relied on the Central States, Southeast and Southwest Areas Pension Fund's Trust Agreement in holding that the Trustees' decision to suspend Mr. Militello's benefits should be reviewed under the arbitrary and capricious standard.

PARTIES TO THE PROCEEDING

Petitioner

Anthony J. Militello is a retired participant of the Central States, Southeast and Southwest Areas Pension Fund.

Respondents

Central States, Southeast and Southwest Areas Pension Fund is a multi-employer pension plan as defined by ERISA, 29 U.S.C. §§ 1002(2)(A) and 1002(37).

The Board of Trustees of the Central States, Southeast and Southwest Areas Pension Fund is the plan sponsor of the Central States, Southeast and Southwest Areas Pension Fund within the meaning of ERISA, 29 U.S.C. § 1002(16)(B).

CORPORATE DISCLOSURE STATEMENT

Respondents do not have parent corporations and no public company owns stock in any Respondent.

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PERTINENT STATUTES AND REGULATIONS

29 U.S.C § 1053(a) provides, in pertinent part, as follows:

> (a) Nonforfeitability Requirements.—Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . .

29 U.S.C. § 1053(a)(3)(B) provides, in pertinent part, as follows:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> * * * * *
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

29 C.F.R. § 2530.203-3(a) provides, in pertinent part, as follows:

> (a) General. Section 203(a)(3)(B) [29 U.S.C. § 1053(a)(3)(B)] of the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable . . . This section sets forth the circumstances and conditions under which such benefit payments may be suspended. A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to

the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Facts Upon Which Mr. Militello's Pension Benefits Were Suspended.

Petitioner, Anthony J. Militello ("Mr. Militello"), was a participant of the Central States, Southeast and Southwest Areas Pension Fund ("Central States") by virtue of his employment as a truck driver at Alco Express, a contributing employer to Central States. In March 1996, Mr. Militello retired from Alco Express at age 53 and applied for pension benefits from Central States. (Record ("R.") 36, ¶ 20.) In support of his application, Central States was told that Mr. Militello was retiring from active driving but that he owned several trucks and trailers which were leased to a trucking company. (R. 36, ¶ 21; R. 21, ¶ 16.) Central States was also

told that Mr. Militello did not have any control over the drivers of the leased trucks. (R. 36, ¶ 21; R. 21, ¶ 16.) Based on this information, Central States approved Mr. Militello's pension application and began to pay him retirement benefits in the amount of $2,600.00 per month effective April 1, 1996. (R. 24, ¶ 22; R. 21, ¶ 19.)

On November 17, 1997, Central States was told by a representative of a local union that Mr. Militello was operating a trucking business which employed truck drivers. (R. 24, Ex. 3 to Ex. A, CS0002, CS0070; R. 21, ¶ 21.) Since the Central States Pension Plan (the "Pension Plan") provides for the suspension of benefits in certain instances of reemployment, Central States investigated this allegation. (R. 24, Ex. 3 to Ex. A, CS0002, CS0069.) Central States advised Mr. Militello that it was alleged that he was the self-employed owner of a trucking company and requested that he provide information about his trucking business. (R. 24, Ex. 3 to Ex. A, CS0069.) Specifically, Mr. Militello was asked to provide a statement describing his day to day duties at the trucking company, whether he performed any driving duties, and whether he employed drivers. (R. 24, Ex. 3 to Ex. A, CS0069.) Mr. Militello was also asked to provide a copy of his 1996 Federal Income Tax Return. (R. 24, Ex. 3 to Ex. A, CS0069.) In response to Central States' inquiries, Mr. Militello stated that he had no day to day duties and that he leased all his trucks to a company called American Motor Lines, who in turn paid and hired the drivers from a company called Michigan Staff Leasing. (R. 24, Ex. 3 to Ex. A, CS0068.) Mr. Militello also submitted a copy of his 1996 Federal Income Tax Return. (R. 36, ¶ 25; R. 21, ¶ 23.) The tax return listed business income and expenses for a business described as "trucking" and with the business name "Anthony Militello." (R. 24, Ex. 3 to Ex. A, CS0047.) Included among the expenses were $98,792 for "fuel" and $21,390 for a "driver bonus." (R. 24, Ex. 3 to Ex. A, CS0048.) After considering all of the new information provided by Mr.

Militello and the union, Central States determined that he had engaged in prohibited reemployment under the Pension Plan because he was the self-employed owner of a trucking company. (R. 24, Ex. 3 to Ex. A, CS0035.) Central States advised Mr. Militello that his pension benefits would be suspended if he did not terminate his employment. (R. 24, Ex. 3 to Ex. A, CS0035.) After Mr. Militello failed to comply, Central States had no choice but to suspend his benefits in accordance with the Pension Plan. (R. 24, ¶ 30.)

Pursuant to Central States' appeals process, Mr. Militello appealed the suspension of his benefits. Mr. Militello exhausted his administrative appeals by taking his claim before the Board of Trustees. On June 10, 1998, the Trustees reviewed all of the information contained in the administrative record and determined that Mr. Militello's employment by and ownership of Anthony Militello Trucking constituted prohibited reemployment and upheld the suspension of his benefits. (R. 24, Ex. 3 to Ex. A, CS0003.)

B. The District Court Determined That There Was Sufficient Evidence To Uphold The Trustees' Decision.

On April 23, 2001, Mr. Militello filed suit under ERISA, 29 U.S.C. § 1132, seeking to overturn the suspension of his benefits. In the District Court, Mr. Militello argued that the Trustees' decision to suspend his benefits should be reviewed *de novo*, that the suspension of his benefits was based on an unlawful and nonuniform interpretation of the Pension Plan in violation of 29 U.S.C. § 1132(a)(1)(B), that he was not given adequate notice of the reasons for his suspension under 29 U.S.C. § 1133(a) and that the suspension of his benefits violated 29 U.S.C. § 1053.

The District Court reviewed the Pension Plan and Central States' Trust Agreement and held that both documents conferred the Trustees with discretionary authority to deter-

mine eligibility for benefits. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 209 F.Supp.2d 923, 928-29 (N.D.Ill. 2002). Accordingly, the District Court reviewed the Trustees' decision to suspend Mr. Militello's benefits under the arbitrary and capricious standard. *Id.* at 929. After reviewing the evidence that was considered by the Trustees, the District Court determined that there was sufficient evidence to conclude that Mr. Militello had engaged in prohibited reemployment under the Pension Plan. Specifically, the District Court noted that if Mr. Militello was simply leasing the trucks to another company, "he would not have incurred anything in driver expenses or much at all in the way of fuel expenses." *Id.* at 930. After rejecting Mr. Militello's remaining arguments, the District Court upheld the Trustees' decision and entered summary judgment for Central States. *Id.* at 934.

C. The Seventh Circuit Determined That There Was Sufficient Evidence To Uphold The Trustees' Decision.

Mr. Militello appealed the District Court's decision to the Seventh Circuit and presented the same arguments (and some new arguments). Like the District Court, the Seventh Circuit specifically noted that the fuel expenses and driver bonus listed on Mr. Militello's tax return suggested that he was running a trucking business that employed drivers. *Militello v. Central States, Southeast and Southwest Areas Pension Fund*, 360 F.3d 681, 687 (7th Cir. 2004). The court also noted that Mr. Militello listed his business as "trucking" and that the information provided to the Trustees was consistent with the union representative's statement. *Id.* at 687. After concluding that such activity violated the plan's prohibition against managing employees, supervising employees, or engaging in self-employment in the trucking industry, the Seventh Circuit upheld the Trustees' decision and affirmed the District Court.

REASONS FOR DENYING THE PETITION

A. There Is No Compelling Reason To Grant Mr. Militello's Petition.

Ever since this Court's decision in *Lau Ow Bew*, 141 U.S. 583, 12 S.Ct. 43 (1891), the Court has exercised great restraint in granting certiorari. The power has been sparingly used and reserved for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383, 13 S.Ct. 758 (1893). Mr. Militello's case satisfies neither requirement. There is no conflict between the circuit courts on any issue raised by Mr. Militello and no important federal question was decided in a way which conflicts with decisions from this Court. Mr. Militello's case satisfies none of the "compelling reasons" listed in Supreme Court Rule 10.

Mr. Militello has framed the questions presented as broadly as possible to convey the impression that the Seventh Circuit's decision will impact millions of people. However, Mr. Militello's case turned on the Trustees' interpretation of the individual facts involved, not a general statement of the law. Accordingly, it is unlikely that it will have a lasting impact on anyone other than Mr. Militello. Admittedly, the case, like any other case, is important to the individual involved. However, that is not a compelling reason to grant certiorari. Granting Mr. Militello's petition will not "secure uniformity of decision" since there is no split of authority among the Circuit Court of Appeals regarding the issues involved. No important question of federal law has been decided by the Seventh Circuit which conflicts with decisions from this Court. Accordingly, Mr. Militello's petition should be denied.

B. Mr. Militello Waived His Argument That Central States Violated ERISA's "Anti-Cutback" Rule Because He Failed To Raise It In The Lower Courts.

In light of this Court's recent decision in *Central Laborers' Pension Fund v. Heinz*, – U.S. –, 124 S.Ct. 2230 (2004), Mr. Militello argues that Central States violated ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g). However, neither the District Court nor the Seventh Circuit addressed the applicability of the anti-cutback rule to this case because Mr. Militello never raised this argument in the lower courts. He should not be allowed to raise it for the first time before this Court.[1] *Glover v. U.S.*, 531 U.S. 198, 205, 121 S.Ct. 696 (2001)(only in exceptional cases does the Court decide questions not raised or resolved in the lower courts).

Even if this Court allows Mr. Militello to rely on *Heinz* and assert the "anti-cutback" argument, it is doomed to fail. In *Heinz*, this Court held that ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), prohibited the amendment of a pension plan which expanded the categories of post-retirement employment (*i.e.*, prohibited reemployment) that triggers suspension of payment of early retirement benefits that had already accrued. Section 1054(g)[2] and *Heinz* are inapplicable to the case at bar because there was no amendment to Central States' prohibited reemployment rules. Indeed, Mr. Militello does not claim there was an amendment to the Pension Plan. Instead, he raises the novel legal claim that an alleged "reinterpretation" of the Pension Plan rules is tantamount to an amendment.

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[1] Since the Seventh Circuit decided *Heinz* on September 13, 2002, Mr. Militello had the opportunity to rely on that case prior to the filing of his opening brief.

[2] All statutory citations contained in this brief refer to "29 U.S.C. §____" unless indicated otherwise.

Central States' Pension Plan prohibits a participant from engaging in certain types of employment after his retirement. The prohibited reemployment rules provide that a pensioner will have his pension benefits permanently suspended for any month before his normal retirement age (65) in which he works in "Prohibited Reemployment." (R. 24, Ex. 2 to Ex. A, pp. 21, 57-59.) The term "Prohibited Reemployment" is defined in the Pension Plan, in relevant part, as:

> Employment in any position, including a managerial or supervisory position and including self-employment, but not including government employment, either in the same industry in which the Participant or Pensioner earned any Contributory Service Credit while covered by the Pension Fund, or in any other industry if the Participant or Pensioner is in the same job classification as are other Participants then employed by a Contributing Employer located within the same standard metropolitan statistical area.

(R. 24, Ex. 2 to Ex. A, p. 59.) In contrast to *Heinz*, there was no amendment to this rule during the relevant time periods. Since there was no amendment, Mr. Militello is forced to argue (for the first time) that the Trustees violated ERISA's anti-cutback rule by "reinterpreting" the prohibited reemployment rules to include expanded categories of post-retirement activities which would trigger benefit suspensions. This is false.

Notably, Mr. Militello fails to point to any evidence or cite to specific examples to show that the Trustees "reinterpreted" the prohibited reemployment rules. Additionally, Mr. Militello's argument contradicts the Seventh Circuit's holding that the Trustees' decision was consistent with "the plan's *plain language* . . . that owning a trucking business that employed drivers violated the plan's prohibition against managing employees, supervising employees, or engaging in

self-employment in the trucking industry." *Militello*, 360 F.3d at 688 (emphasis added).

Certiorari should not be granted because Mr. Militello waived his "anti-cutback" argument by failing to raise it in the lower courts. Even if it is not deemed waived, the argument is frivolous because there was no condition added to the Pension Plan with regard to Mr. Militello's accrued benefits and there was no amendment or "reinterpretation" of the prohibited reemployment rules.

C. The Seventh Circuit Correctly Held That 29 U.S.C. §1053(a) And 29 C.F.R. § 2530.203-3 Do Not Apply To Claimants Who Have Not Attained Normal Retirement Age.

In his petition, Mr. Militello asks this Court to review the Seventh Circuit's holding that § 1053(a) and its accompanying regulations do not apply to claimants who have not attained normal retirement age. Since the Seventh Circuit's decision is consistent with the plain language of ERISA and the applicable regulations, Mr. Militello's petition should be denied.

Mr. Militello argues that § 1053(a) and its accompanying regulations do not permit benefit suspensions for self-employment. Mr. Militello notes that 29 C.F.R. § 2530.203-3(c)(2) only speaks of "service (as defined in § 2530.200b-2(a)(1) and (2))", which in turn mentions work for another employer—not self-employment. Since he was self-employed, Mr. Militello concludes that Central States had no authority under 29 U.S.C. § 1053 and 29 C.F.R. § 2530.203-3 to suspend his benefits. Mr. Militello fails to mention that part (a) of the regulation specifically excludes claimants who have not attained normal retirement age from its protection:

> (a) General. Section 203(a)(3)(B) [29 U.S.C. § 1053 (a)(3)(B)] of the Act provides that the right to the employer-derived portion of an accrued pension benefit

> shall not be treated as forfeitable . . . This section sets forth the circumstances and conditions under which such benefit payments may be suspended. **A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age**, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment and **without regard to the provisions of section 203(a)(3)(B) and this regulation** to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof.

29 C.F.R. § 2530.203-3(a) (emphasis added). The "normal retirement age" under the Pension Plan is sixty-five. (R. 24, Ex. 2 to Ex. A, p. 21.) Mr. Militello retired at age fifty-three and has still not attained the normal retirement age. (R. 36, ¶¶ 18 & 20.) Accordingly, the Seventh Circuit correctly held that § 1053(a) and 29 C.F.R. § 2530.203-3 did not apply to Mr. Militello. *Militello*, 360 F.3d at 691; *see also Whisman v. Robbins*, 55 F.3d 1140, 1146 (6th Cir. 1995) (holding that a plan may suspend otherwise accrued benefits without regard to the provisions of § 1053(a)(3)(B) and 29 C.F.R. § 2530.203-3 when a participant retires prior to "normal retirement age" and then begins other employment). In other words, it is irrelevant whether self-employment is considered "service" under 29 C.F.R. § 2530.203-3 because Central States was allowed to suspend Mr. Militello's pension benefits without regard to 29 U.S.C. § 1053(a) and 29 C.F.R. § 2530.203-3.[3]

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[3] Under the Central States Pension Plan, "[e]mployment in any position, including a managerial or supervisory position and **including self-employment**" can qualify as Prohibited Reemployment. (R. 24, Ex. 2 to Ex. A, p. 59) (emphasis added.)

Citing *Heinz*, Mr. Militello argues that suspensions under § 1053(a)(3)(B) are permissible only in narrow circumstances—regardless of reaching normal retirement age. Mr. Militello misreads *Heinz* because that case did not address the applicability of § 1053(a)(3)(B) to claimants who retire prior to normal retirement age. However, even if Mr. Militello's reading of *Heinz* is correct, the "narrow circumstances" was satisfied here by the finding that Mr. Militello was employed in the trucking business after he retired.

The Seventh Circuit correctly held that § 1053(a) and 29 C.F.R. § 2530.203-3 do not apply to claimants who have not attained normal retirement age. The Seventh Circuit's decision is consistent with the plain text of ERISA and the regulations. Accordingly, Mr. Militello's petition should be denied.

D. The Seventh Circuit Correctly Relied On The Central States Trust Agreement In Holding That The Trustees' Decision Should Be Reviewed Under The Arbitrary And Capricious Standard.

In the courts below, Mr. Militello argued that the Trustees' decision to suspend his benefits should be reviewed *de novo*. In addressing this argument, the Seventh Circuit reviewed the terms of the Central States Trust Agreement (the "Trust Agreement") and held that it conferred broad discretionary authority to determine eligibility for benefits.[4] *Militello*, 360 F.3d at 685-86. Mr. Militello argues that certiorari should be granted because the discretion afforded under the Trust Agreement is irrelevant. Specifically, he argues that the Trust Agreement is not an ERISA "plan document" which informs participants of their rights and obligations. However, he offers no authority in support of his argument. Indeed, Mr.

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[4] Although not addressed by the Seventh Circuit, Central States maintains that the Pension Plan also confers the Trustees with discretionary authority.

Militello's argument conflicts with ERISA and this Court's prior decisions.

ERISA provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83, 115 S.Ct. 1223 (1995). "In the words of the key congressional report, '[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan.'" *Id.* at 83 (quoting H.R. Rep. No. 93-1280 at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5077, 5078). ERISA gives effect to this "written plan documents" scheme through the "reporting and disclosure" requirements in 29 U.S.C. §§ 1021-1031. *Curtiss-Wright*, 514 U.S. at 83, 115 S.Ct. 1223. One of the formal "plan documents" that must be available for examination under ERISA's reporting and disclosure requirements is the "trust agreement." 29 U.S.C. § 1024(b)(2). If requested, the plan must furnish a copy of the trust agreement to the plan participant. 29 U.S.C. § 1024(b)(4). By definition, the Trust Agreement is an ERISA "plan document."

Mr. Militello's argument also conflicts with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). In *Firestone*, 489 U.S. at 111, 109 S.Ct. 948, this Court cited *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833 (1985), for the proposition that in determining the appropriate standard of review under ERISA, a court must be guided by principles of trust law. In *Central Transport*, the Court construed the provisions of the Central States Trust Agreement and observed that it gave the Trustees authority to do all acts necessary and proper for the protection of property held under the Trust Agreement. 472 U.S. at 565-66, 105 S.Ct. 2833.

The Seventh Circuit correctly relied on the Trust Agreement in determining that the Trustees' decision to suspend Mr. Militello's benefits should be reviewed under the arbitrary and capricious standard. The Trust Agreement is an ERISA "plan document" which notifies participants of the broad discretionary authority afforded the Trustees to determine eligibility for benefits. The Seventh Circuit's decision is consistent with ERISA and this Court's prior decisions. Mr. Militello's petition should be denied.

CONCLUSION

Traditionally, the Court has reserved its certiorari power for cases of "peculiar gravity and general importance" or "to secure uniformity of decision." The Seventh Circuit's decision will not have a lasting impact on anyone other than Mr. Militello. Additionally, there is no split of authority among the Circuit Court of Appeals and no important federal question was wrongly decided. The Trustees' decision to suspend Mr. Militello's benefits has already been reviewed and upheld by two courts. Mr. Militello is not entitled to review by this Court simply because he disagrees with the lower courts' decisions. The Seventh Circuit correctly upheld the Trustees' decision in accordance with the plain text of ERISA, its regulations and this Court's prior decisions. For these reasons, Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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